Supreme Court, U.S.
FILED
MAR 31 1999
OFFICE OF THE CLERK

No. 98-1273

In The

Supreme Court of the United States

October Term, 1998

FRED VAN DYKEN,

Petitioner,

v.

RICK DAY, Director,
Montana Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Montana Attorney General
ELIZABETH S. BAKER*
Chief Deputy Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32pp

QUESTION PRESENTED

Given that the Petitioner offered a mental state instruction that was an incorrect statement of state law, that the jury was correctly instructed on the definitions of "knowingly" and "negligently," and that Petitioner's own testimony conclusively established that he purposely or knowingly killed the victim, did the court below err in affirming the denial of habeas relief on the ground that any instructional error in the definition of "purposely" did not have substantial and injurious effect or influence in determining the jury's verdict?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES OR OTHER PROVISIONS INVOLVED .. 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

I. THE NINTH CIRCUIT'S APPLICATION OF THE *BRECHT* HARMLESS ERROR STANDARD DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL 7

II. THE *KOTTEAKOS* STANDARD OF HARMLESS-ERROR REVIEW IS CONSISTENT WITH THIS COURT'S HABEAS CORPUS JURISPRUDENCE AND APPLIES PROPER DEFERENCE TO STATE COURT JUDGMENTS 10

A. Applying Standards on Collateral Review Less Onerous Than the Standard of Review on Direct Appeal Is an Appropriate Recognition of the States' Interest in Finality ... 10

B. Jury Instructions Given in a State Criminal Trial Must Be Reviewed by a Habeas Court as a Whole and in the Context of the Entire Trial 11

TABLE OF CONTENTS – Continued

Page

C. Applying Proper Standards of Review, the Court Below Correctly Found That if There Was Error in the Instructions, It Was Harmless 12

III. THIS IS NOT AN APPROPRIATE CASE TO REVISIT *CALIFORNIA v. ROY* OR THE APPROPRIATE HARMLESS-ERROR STANDARD ON COLLATERAL REVIEW OF JURY INSTRUCTIONS 15

CONCLUSION 17

APPENDIX:

Jury Instructions on Elements of the Offense..... 1a

Petition for Writ of Habeas Corpus 3a

Instruction "G" Offered by Petitioner 10a

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 6, 8, 10, 11

California v. Roy, 519 U.S. 2 (1996) 7, 8, 10, 15

Chapman v. California, 386 U.S. 18 (1967) 10, 11

Cupp v. Naughten, 414 U.S. 141 (1973) 11

Dyer v. Calderon, 122 F.3d 720 (9th Cir. 1997), *vacated on other grounds*, 151 F.3d 970 (9th Cir. 1998) 9

Estelle v. McGuire, 502 U.S. 62 (1991) 11, 14

Gilbert v. Moore, 134 F.3d 642 (4th Cir.), *cert. denied*, 119 S. Ct. 103 (1998) 8, 9

Harris v. Warden, La. State Penitentiary, 152 F.3d 430 (5th Cir. 1998) 8

In re Winship, 397 U.S. 358 (1970) 11, 12

Jenkins v. Nelson, 157 F.3d 485 (7th Cir.), *petition for reh'g denied*, 1998 U.S. App. LEXIS 27874 (7th Cir. 1998) 8

Kotteakos v. United States, 328 U.S. 750 (1946) .. 6, 8, 10, 11

O'Neal v. McAninch, 513 U.S. 432 (1995) 8

Peck v. United States, 106 F.3d 450 (2d Cir. 1997) 8

Smith v. Horn, 120 F.3d 400 (3d Cir. 1997), *cert. denied sub nom., District Attorney of Bucks County v. Smith*, 118 S. Ct. 1037 (1998) 8, 9

Stanton v. Benzler, 146 F.3d 726 (9th Cir. 1998) 8, 9

State v. Leyba, 915 P.2d 794 (Mont. 1996) 12

TABLE OF AUTHORITIES – Continued

Page

State v. Rothacher, 901 P.2d 82 (Mont. 1995)..5, 6, 12, 13

State v. Van Dyken, 791 P.2d 1350 (Mont. 1990) 3, 5, 6, 12

United States v. Holland, 116 F.3d 1353 (10th Cir.), *cert. denied*, 118 S. Ct. 253 (1997)..... 9

United States v. Santopietro, 166 F.3d 88 (2d Cir. 1999)..... 8

Van Dyken v. Montana, 498 U.S. 920 (1990) 3

Victor v. Nebraska, 511 U.S. 1 (1994) 12

FEDERAL MATERIALS

United States Code

Tit. 28, § 1254(1)..... 1

MONTANA MATERIALS

Montana Code Annotated

§ 45-2-101(33) (1983).....1, 13

§ 45-2-101(58) (1983)..... 2

§ 45-5-101(1) (1983)..... 1

§ 45-5-102(1)(a) (1983) 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix to the Petition at App. 1. The underlying opinion of the United States District Court for the District of Montana is reprinted in the Appendix to the Petition at App. 8.

JURISDICTION

Respondent concurs that jurisdiction is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the constitutional provisions included by Petitioner, the following state statutes are pertinent to review of this matter:

Mont. Code Ann. § 45-5-101(1) (1983):

> A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

Mont. Code Ann. § 45-5-102(1)(a) (1983):

> [C]riminal homicide constitutes deliberate homicide if: (a) it is committed purposely or knowingly; . . . .

Mont. Code Ann. § 45-2-101(33) (1983):

> "Knowingly" – a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when

> he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.

Mont. Code Ann. § 45-2-101(58) (1983):

> "Purposely" – a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

INTRODUCTION

Jury instructions given at Petitioner's deliberate homicide trial required the jury to find Petitioner guilty if it found he acted purposely or knowingly in shooting Missoula County Deputy Sheriff Allen Kimery. The trial court refused an instruction offered by Petitioner that the jury must find he acted "with the knowledge he was causing or with the purpose to cause the death." On appeal, the Montana Supreme Court held that Petitioner's proffered instruction was not a correct statement of state law. Eight years later, the state's high court invalidated as an incorrect statement of state law an instruction – not given at Petitioner's trial – that deliberate homicide is committed when the act is done purposely without regard to the result intended.

Given that Petitioner's jury was instructed on the mental state elements of the offense, that it was correctly told "knowingly" means a person "is aware that it is

highly probable that the result will be caused by his conduct," and that it was also instructed on the elements of negligent homicide, the court below found any error "in one prong" of the "purposely" instruction to be harmless in light of the physical evidence at trial and Petitioner's own testimony which established conclusively that he purposely or knowingly killed Officer Kimery.

STATEMENT OF THE CASE

Petitioner was convicted by a state court jury in June 1987 of deliberate homicide arising from the 1984 shooting death of Missoula County Deputy Sheriff Allen Kimery. The Montana Supreme Court affirmed his conviction, *State v. Van Dyken*, 791 P.2d 1350 (Mont. 1990), and his petition for a writ of certiorari was denied by this Court, *Van Dyken v. Montana*, 498 U.S. 920 (1990).

Petitioner filed a petition for writ of habeas corpus on January 11, 1994, and final judgment was entered in Respondent's favor on May 11, 1997. (Pet. Cert. at App. 8.) Following appeal to the Ninth Circuit United States Court of Appeals, the district court's judgment denying the petition for habeas corpus was affirmed on November 16, 1998. (Pet. Cert. at App. 1.)

At his trial, Petitioner admitting shooting Officer Kimery after being stopped on suspicion of gasoline theft in the early morning hours of December 6, 1984. Petitioner claimed, however, that he did not intend to kill Officer Kimery. Both parties presented expert testimony as to whether, given the level of his alcohol consumption, Petitioner had the capacity to act purposely or knowingly

at the time the shot was fired. As discussed by the court below, the evidence at trial showed that Officer Kimery was standing just a few feet from the gun when he was shot; that Petitioner had to turn and hold the gun outside the driver's side window in order to fire the shot; and that Petitioner, who was driving a stolen car at the time, had declared earlier in the evening that he would shoot a police officer if pulled over. Moreover, Petitioner himself testified that he saw a police officer approach his car, he aimed the gun in the officer's general direction, he intended to fire the gun, and he knew guns could kill.

The trial court instructed the jury that in order to convict Petitioner of deliberate homicide it must find the following elements beyond a reasonable doubt:

> First, that the Defendant performed the acts causing the death of Alan [sic] Kimery;
>
> Second, that when the Defendant did so, he acted purposely or knowingly;
>
> Third, that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse.

The jury was given additional instructions with respect to the meaning of "purposely" and "knowingly." (App. 1a.) In addition, it was instructed on the elements of negligent homicide and the definition of criminal negligence. (App. 1a-2a.) Finally, the jury was expressly instructed that it could consider Petitioner's intoxication in determining whether he possessed the requisite mental state to commit the offense. (App. 2a.)

Petitioner proposed, and the trial court rejected, an instruction that would have required the jury to find he had acted "with the knowledge he was causing or with the purpose to cause the death." On direct appeal, the Montana Supreme Court held that Petitioner's "proposed instruction is not the law in Montana." *Van Dyken*, 791 P.2d at 1362. Eight years after Petitioner's conviction became final, the Montana Supreme Court decided *State v. Rothacher*, 901 P.2d 82 (Mont. 1995), invalidating the following jury instruction as an incorrect statement of Montana law:

> In order to convict the defendant of Deliberate Homicide, it is not necessary for the State to prove that the defendant intended to cause [the] death of [the] victim. Death may not be the intended result, *but, if the act which causes the death is done purposely*, and no circumstances of mitigation, excuse or justification appear, deliberate homicide is committed unless the result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

901 P.2d at 84. While the court reaffirmed long-standing Montana law that specific intent is not required for deliberate homicide, the above instruction was rejected because – as stated in the court's opinion in *Van Dyken* – the statute "does at least require that [the defendant] intended a similar kind of harm." *Id.* at 85. Thus, "[i]t is not sufficient . . . that the act which caused the harm be done purposely without regard to whether *any* harm was intended." *Id.*

The instruction found offensive in *Rothacher* was not given at Petitioner's trial. In fact, the jury was not

instructed that a conviction could be had simply on evidence that Petitioner was "aware of his conduct," even though the statutory definition of "knowingly" encompassed that concept. The trial court acknowledged that Montana law allowed the jury to convict Petitioner "if [the jurors] agree that he intended to shoot Sgt. Kimery but did not intend to kill him." (Trial Tr. at 1834.) That statement was cited approvingly in the Montana Supreme Court's decision affirming Petitioner's conviction, *Van Dyken*, 791 P.2d at 1362, and was not affected by *Rothacher*, 901 P.2d at 85.

The court below, as had the district court, "assume[d] for purposes of decision" that the mental state instruction given at Petitioner's trial was constitutionally defective because it failed to make clear that conviction required a finding either of an intent to kill or of an intent to inflict an injury similar to the injury actually sustained by the victim. The court concluded, however, that "the error was harmless because it had no 'substantial and injurious effect in determining the jury's verdict.' " (Pet. Cert. at App. 7) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), and *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

SUMMARY OF ARGUMENT

This case does not present a significant constitutional or federal question for determination by the Court. The Ninth Circuit's application of the harmless error standard is consistent with previous decisions of this Court and gives appropriate deference to the finality of the state

courts' determinations. Petitioner was convicted under jury instructions that correctly stated Montana law at the time of trial and, viewed as a whole, properly set forth each element of the offense with which Petitioner was charged. Even if the Court were inclined, as Petitioner requests, to adopt the harmless error approach suggested in Justice Scalia's concurring opinion in *California v. Roy*, 519 U.S. 2, 6 (1996) (per curiam), this case does not present the appropriate vehicle in which to do so. The jury instructions adequately covered all elements of the offense and left no room for the jury to convict Petitioner without finding that he intended to cause the victim's death or knew there was a high probability his actions would bring about that result.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF THE *BRECHT* HARMLESS ERROR STANDARD DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL.

Citing *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam), the court below determined that any instructional error in this case was harmless because the court was "not in grave doubt about whether it had a 'substantial and injurious effect or influence in determining the jury's verdict.' " (Pet. Cert. at App. 5.) This is a proper application of the harmless error standard on collateral review of jury instructions that incorrectly define the crime or misdescribe an element of the crime. In *Roy*, this Court made clear "that for reasons related to the special

function of habeas courts, those courts must view [trial] error under the *Kotteakos* standard." 519 U.S. at 6.

The *Kotteakos* standard for harmless-error review requires reversal of a conviction only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Since *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), it has been settled that this standard applies on habeas review of trial errors. *Roy* clarified that instructional errors amounting to a misdescription of an element of the charged offense are trial errors subject to the same standard. 519 U.S. at 5-6. Only if the habeas court "is in grave doubt as to the harmlessness" of the error should it grant relief. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

Despite Petitioner's claim that *Roy* requires clarification to determine " 'what *constitutes* the harmlessness to which this more deferential standard is applied,' " (Pet. Cert. at 5) (quoting *Roy*, 519 U.S. at 6 (Scalia, J., concurring)), there is no compelling split of authority among the circuit courts that calls out for additional explanation of the standard. The courts are in harmony in their application of *Roy* to collateral review of trial errors involving jury instructions. *United States v. Santopietro*, 166 F.3d 88, 94 (2d Cir. 1999); *Gilbert v. Moore*, 134 F.3d 642, 648 (4th Cir.), *cert. denied*, 119 S. Ct. 103 (1998); *Harris v. Warden, La. State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Jenkins v. Nelson*, 157 F.3d 485, 494-95 (7th Cir.), *petition for reh'g denied*, 1998 U.S. App. LEXIS 27874 (7th Cir. 1998); *Stanton v. Benzler*, 146 F.3d 726, 728 (9th Cir. 1998); *Peck v. United States*, 106 F.3d 450, 455 (2d Cir. 1997); *Smith v. Horn*, 120 F.3d 400, 417 (3d Cir. 1997), *cert. denied sub nom.*,

District Attorney of Bucks County v. Smith, 118 S. Ct. 1037 (1998). While the Tenth Circuit has applied the *Roy* concurrence to "shed[ ] light on" the court's harmless-error analysis of a faulty jury instruction, it nonetheless found the error harmless where the necessary jury findings satisfied all the requirements needed for conviction. *United States v. Holland*, 116 F.3d 1353, 1357 n.3, and 1359 (10th Cir.), *cert. denied*, 118 S. Ct. 253 (1997).

Aside from *Holland*, which used the Scalia concurrence as "guidance," 116 F.3d at 1357 n.3, the circuit courts appear to be uniform in their approach to determination of harmless error on collateral review of defective jury instructions:

> The distinction between the type of harmless-error review necessary on direct review compared to that applicable in habeas review is especially well defined in the context of an improper jury charge. The Supreme Court has instructed that in assessing whether an improper jury instruction had a substantial and injurious effect on the verdict, a court need not conclude that " 'the facts found by the jury establish[ ] that the jury necessarily found' " the element on which the improper instruction was given as would be required on direct review.

Gilbert, 134 F.3d at 648. *See also Jenkins*, 157 F.3d at 495-96; *Dyer v. Calderon*, 122 F.3d 720, 737-38 (9th Cir. 1997), *vacated on other grounds*, 151 F.3d 970 (9th Cir. 1998). There are no direct conflicts between the circuits that justify a grant of certiorari in this case.

II. THE *KOTTEAKOS* STANDARD OF HARMLESS-ERROR REVIEW IS CONSISTENT WITH THIS COURT'S HABEAS CORPUS JURISPRUDENCE AND APPLIES PROPER DEFERENCE TO STATE COURT JUDGMENTS.

A. Applying Standards on Collateral Review Less Onerous Than the Standard of Review on Direct Appeal Is an Appropriate Recognition of the States' Interest in Finality.

This Court has recognized that the *Kotteakos* standard "is better tailored to the nature and purpose of collateral review than the [more stringent] *Chapman [v. California*, 386 U.S. 18 (1967)] standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The Court noted in *Brecht* that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, 'a bulwark against convictions that violate "fundamental fairness." ' " *Id.* at 633-34 (internal citations omitted). Thus, although Petitioner complains that *California v. Roy* creates "a confusing two-tier 'double standard' in harmless error jurisprudence as between collateral review and direct appeal" (Pet. Cert. at 8), "it hardly bears repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.' " *Brecht*, 597 U.S. at 634 (internal citations omitted).

The states' interest in the finality of convictions that have survived direct review within the state court system counsels adherence to the *Kotteakos* standard of harmless-error review. *Roy*, 519 U.S. at 6 ("for reasons related to

the special function of habeas courts, those courts must review [trial] error . . . under the *Kotteakos* standard"). "Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Brecht*, 697 U.S. at 637. The Court's observance in *Brecht* that the lack of a statute of limitations in habeas cases adds to the "social costs" of reversing state court judgments is well illustrated instantly, where Petitioner seeks relief on the basis of a change in state law decided nearly a decade after his conviction and where the validity of the jury's verdict is not suspect even in light of that state law change.

—

B. Jury Instructions Given in a State Criminal Trial Must Be Reviewed by a Habeas Court as a Whole and in the Context of the Entire Trial.

It is well settled that jury instructions must be evaluated by a habeas court in the context of the overall charge to the jury, and as a component of the entire trial process. The court's review is limited to determining whether an erroneous instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Habeas relief is not warranted "simply because the instruction may have been deficient" under state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Further, while due process requires a state to prove every element of the crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), "the Constitution

does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The question when reviewing jury instructions in the context of a petition for writ of habeas corpus "is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* at 6.

C. Applying Proper Standards of Review, the Court Below Correctly Found That if There Was Error in the Instructions, It Was Harmless.

The error asserted by Petitioner in his petition for writ of habeas corpus was that the jury instructions given at his trial "convert[ed] the offense of deliberate homicide into a strict-liability offense." (App. 6a.) Petitioner proposed an instruction that would have required the jury to find he acted "with the knowledge that he was causing or with the purpose to cause the death." (App. 8a.) On direct appeal, the Montana Supreme Court held that Petitioner's "proposed instruction is not the law in Montana." *State v. Van Dyken*, 791 P.2d 1350, 1362 (Mont. 1990).

Although the Montana Supreme Court later held invalid an instruction that informed the jury it could convict a person of deliberate homicide without regard to the result intended, *State v. Rothacher*, 901 P.2d 82 (Mont. 1995), Montana law remains that a specific intent to kill is not required, so long as the act which causes the death is done purposely or knowingly within the meaning of the state statutes. *State v. Leyba*, 915 P.2d 794, 798 (Mont.

1996). The concern identified in *Rothacher* was that a negligent homicide situation might become deliberate homicide as a result of the erroneous instruction allowing conviction if the act causing the death was done purposely unless the result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense. 901 P.2d at 88.

At Petitioner's trial, the jury was fully instructed on the state law elements of deliberate homicide, was instructed on the definition of negligent homicide, and was instructed that it could consider Petitioner's intoxication in determining whether he had the requisite mental state to commit the offense. The jury was *not* given the instruction later invalidated by the Montana Supreme Court. Moreover, the trial court omitted the first clause of the statutory definition of "knowingly" – that a defendant acts "knowingly" if he "is aware of his conduct." Mont. Code Ann. § 45-2-101(33) (1983). With that omission, the trial court appropriately focused the jury's attention on the *results* of Petitioner's conduct, agreeing that he could not be convicted of deliberate homicide "if he performed acts that caused the death of [Officer] Kimery, but he was not aware that the result of death might occur from his conduct." (Trial Tr. at 1829.) As noted by the court below, the evidence established conclusively that Petitioner "knowingly" killed Officer Kimery under the terms of this correct instruction. (Pet. Cert. at App. 6.)

The decision below also emphasized the instruction on negligent homicide, noting that it "lessened the potential for the jury to conflate deliberate and negligent homicide." (Pet. Cert. at App. 7.) Because of the instruction on

negligent homicide, the jury was well aware of the difference between offense levels when it entered its deliberations.

Finally, it is important to consider the allegedly defective instruction in the context of the trial record. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner fails to acknowledge the clear record which shows that both parties argued the case to the jury with an emphasis on Petitioner's knowledge and purpose to kill or at least seriously injure Officer Kimery. Without objection, defense counsel even stated in her argument that the State was required to prove that Petitioner "had the intent to kill Allen Kimery and there was absolutely no mitigating surrounding circumstances if and when that happened." (Trial Tr. at 1890-91.) The prosecutor, in turn, argued: "[T]o say that he didn't know what he was doing, that he didn't know that when he fired that bullet at that range at that officer . . . that he would kill him, is absurd." (Trial Tr. at 1872.) The case clearly was presented to the jury as a case in which it had to find that Petitioner's actions were deliberate in order to convict him of the most serious degree of homicide under Montana law.

On the whole, as noted by the court below, "the possibility that the error in defining 'purposely' misled the jury was exceedingly small." (Pet. Cert. at App. 7.) The court thus correctly concluded that the error was harmless because it had no substantial and injurious effect in determining the jury's verdict.

III. THIS IS NOT AN APPROPRIATE CASE TO REVISIT *CALIFORNIA v. ROY* OR THE APPROPRIATE HARMLESS-ERROR STANDARD ON COLLATERAL REVIEW OF JURY INSTRUCTIONS.

Petitioner argues that the Court should accept jurisdiction of this case to establish that instructional error can be harmless, even on collateral review, " 'only if the jury verdict on other points effectively embraces this one, or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.' " (Pet. Cert. at 7) (quoting *Roy*, 519 U.S. at 7 (Scalia, J., concurring)). Notwithstanding Petitioner's failure to address the propriety of a more deferential standard of review in habeas corpus cases, this case simply does not present the appropriate opportunity to revisit the concurrence in *Roy*.

The concurring members of the Court in *Roy*, observing that the jury is required to find a defendant guilty of each necessary element of the crime, noted that such a verdict, "[f]ormally, at least," did not exist in that case: "[T]he jury was never asked to determine that Roy had the 'intent or purpose of committing, encouraging, or facilitating' his confederate's crime." 519 U.S. at 7 (Scalia, J., concurring). The concurrence further noted that the error could be harmless only if the verdict on other points "effectively embraces" the omitted element "or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding [that element] as well." *Id.*

Here, the instructions *did* ask the jury to determine all of the facts necessary to constitute the offense under state law. It was instructed that it must find the defendant purposely or knowingly committed the acts that caused the death of Officer Kimery. Embraced within that instruction are the components of both conduct and result. The jury was also instructed that in order to find Petitioner acted "knowingly" it had to find he was aware of a "high probability" that death would result from his conduct. The jury was never told that it could convict Petitioner simply upon evidence that he was "aware" that he was pulling the trigger, without regard to the likely result.

The lone possible instructional error found by the court of appeals was in the following definition of "purposely":

> A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.

(App. 1a.) Any error was in the trial court's omission of an instruction that Petitioner must intend at least a similar kind of harm in order to be found to have acted purposely.

When viewed in the context of all the other instructions, including the instructions defining "knowingly," "negligence," and the effect of intoxication, any misdescription of the "purposely" element of the offense can hardly be found significant, even under the analysis employed in the *Roy* concurrence. The jury simply was

not instructed or led to believe that it could convict Petitioner of deliberate homicide on the basis of conduct alone, without regard to the result he intended.

These facts do not present a compelling case on which the Court should reexamine its harmless-error analysis of faulty jury instructions on collateral review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General of Montana
ELIZABETH S. BAKER*
Chief Deputy Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
Counsel of Record

April 1999

APPENDIX

A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.

A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.

(Trial Tr. at 1837.)

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation. "Gross deviation"

means a deviation that is considerably greater than lack of ordinary care.

(Trial Tr. at 1839.)

A person cannot escape criminal responsibility for his conduct simply by being in an intoxicated or drugged condition. However, such a condition may be taken into consideration in determining the existence or non-existence of a mental state which is an element of the offense.

In other words, where knowledge or purpose are elements of a crime, a condition of intoxication or of being drugged, from whatever cause, which might prevent one from knowing or having the purpose essential to the crime, are to be taken into consideration in determining whether the Defendant is guilty or not guilty of the crime.

(Trial Tr. at 1842-43.)

WILLIAM BOGGS
P. O. Box 7881
Missoula, MT 59807
Telephone: (406) 728-3088

MARGARET L. BORG, Chief
PUBLIC DEFENDER OFFICE
Missoula County
317 Woody Street
Missoula, Montana 59802
Telephone: (406) 721-5700
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FRED DANIEL VAN DYKEN, Petitioner, -vs- JAMES M. GAMBLE, Administrator, Montana Dept. of Corrections, Custodial Respondent, and ATTORNEY GENERAL OF THE STATE OF MONTANA, Additional Respondent.	Cause No. CV 94-6-M (Filed Jan. 11, 1994)

****

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW the Petitioner, Fred D. VanDyken, by and through counsel, and, pursuant to 28 U.S.C. Section 2254, petitions this Court to issue a Writ of Habeas Corpus vacating his conviction and sentence herein as being unconstitutionally obtained and imposed. In support of this Petition, Petitioner states:

1. He is presently incarcerated at the Montana State Prison, Deer Lodge, Montana, 59722. His prison number is AO21997.

2. Petitioner was convicted of deliberate homicide in Cause Number 6877, Montana Fourth Judicial District Court, Missoula County, Missoula, Montana. By Judgment dated September 1, 1987, in that cause, he was sentenced to life imprisonment without eligibility for parole.

3. Petitioner was, on December 11, 1984, charged by Information with deliberate homicide. He pled not guilty. Pursuant to a change of venue, he was tried before a jury in Park County, Montana, on September 9-21, 1985, Honorable Thomas A. Olson presiding. Defendant did not testify at the trial. The jury was apparently unable to reach a verdict, and a mistrial was declared.

4. Subsequently, on December 23, 1985, Defendant plead [sic] guilty to the charged offense, pursuant to a plea agreement wherein he would have received a sentence of up to 100 years, with no restriction on parole eligibility. On January 24, 1986, Judge Olson rejected the plea, ordered it withdrawn, and reinstated Defendant in a not guilty status.

5. Prior to his second trial, following certain pretrial rulings by the trial Court, both the State and Defendant filed requests for interlocutory review with the Montana Supreme Court [Cause Number 86-279]. Following the filing of six plenary briefs by the parties, the Supreme Court on November 13, 1986, issued an order dismissing the case for lack of jurisdiction. Defendant's Petition for Rehearing was denied by Opinion and Order dated January 20, 1987.

6. After several judge recusals, the Honorable James B. Wheelis assumed jurisdiction of the case, and the place of trial was changed from Park to Lewis & Clark County. There, on June 8-26, 1987, the Defendant was again tried before a jury. Defendant testified at the second trial. The jury found him guilty of deliberate homicide, and he was sentenced as set out above.

7. Defendant appealed the conviction to the Montana Supreme Court [Cause No. 88-38]. On May 3, 1990, the Montana Supreme Court issued an Opinion affirming the conviction, *State v. VanDyken*, 791 P.2d 1350 (Mont. 1990). On May 9, 1990, the Defendant filed a Petition for Rehearing with the Montana Supreme Court, which was denied May 25, 1990.

8. On August 22, 1990, Defendant filed a Petition for Certiorari with the United States Supreme Court. [Cause No. 90-347]. Certiorari was denied October 15, 1990, *VanDyken v. Montana*, 111 S.Ct. 297 (1900) [sic].

9. On April 11, 1991, the Defendant applied for review of his sentence before the Sentence Review Division of the Montana Supreme Court. The application was

heard November 8, 1991. On January 6, 1992, the Sentence Review Division, by a 2-1 decision, denied Defendant's request to have the parole ineligibility portion of his sentence modified.

10. Other than the proceedings above-described, Defendant has undertaken no legal actions with respect to this Judgment in any Court. No proceedings are presently pending.

11. For the convenience of the Court in understanding the issues presented in this Petition and for purposes of assisting its determination that the exhaustion requirement of 28 U.S.C. Section 2254(b) has been met, the following documents are appended to this Petition:

(1) Opening Brief of Defendant, *State ex rel VanDyken v. District Court*, Montana Supreme Court Cause Number 86-279 [hereinafter identified as Exhibit A].

(2) Brief of Appellant, *State v VanDyken*, Montana Supreme Court Cause Number 88-38 [hereinafter identified as Exhibit B].

(3) Petition for Certiorari, *VanDyken v Montana*, United States Supreme Court Cause Number 90-347 [hereinafter identified as Exhibit C].

12. Pursuant to the Section 2254 Rules (as amended February 1, 1993), the Petitioner sets out *concisely* the grounds of this application for relief from unconstitutional confinement:

I. Twice placed in jeopardy, in contravention of US Constitution, Amendments V and XIV, in that:

A. At Petitioner's first trial, the Court declared a mistrial without manifest necessity [see Exhibit A, 4-7, 12-22; Exhibit B, 20-31].

B. The State was able to alter the legal positions of the parties so fundamentally and drastically between the first and second trials, solely as a result of the full exposure of the defense case in the first trial, that a core violation of the basic policies underlying the double jeopardy ban occurred, resulting in double jeopardy of Petitioner [see Exhibit B, 31-39; Exhibit C, 4-20].

II. Convicted without due process of law, in that:

At his second trial, the Court refused Defendant's "failure-to-agree" transition instruction, and instead, instructed the jury using the State's "acquittal-first" transition instruction, regarding the proper method and order of deliberation with respect to the different grades of homicide under consideration [see Exhibit B, 54-58; Exhibit C, 21-27].

III. Convicted without due process of law, in that:

At his second trial, the Court refused Defendant's offered instructions defining the crime of deliberate homicide, and instead instructed the jury with a modified version of the *Sigler* instructions offered by the State, thereby converting the offense of deliberate homicide into a strict-liability offense. It violates the due process clause to impose capital or other serious liability for a strict-liability offense [see Exhibit B, 58-70].

IV. Convicted in contravention of his right against compulsory self-incrimination, US Constitution, Amendment V, in that:

Before his second trial, the Court granted the State's motion in limine precluding his expert psychiatric witness from testifying as to Defendant's recollection of any of the crucial events and circumstances surrounding the crime, thus erroneously compelling Defendant to take the witness stand on his own behalf [Exhibit A, 22-46; Exhibit B, 39-54].

13. Petitioner is incarcerated by virtue of no other convictions or judgments.

14. Petitioner has been represented by present counsel since his arrest herein, December 7, 1984.

WHEREFORE, the Petitioner prays that the Court grant Petitioner the relief to which he may be entitled in this proceeding.

RESPECTFULLY SUBMITTED this 10th day of January, 1994.

WILLIAM BOGGS
Attorney at Law

/s/ *William Boggs*
P.O. Box 7881
Missoula, MT 59807
(406) 728-3088

MARGARET L. BORG
Public Defender's Office

/s/ *Margaret L. Borg*
317 Woody Street
Missoula, MT 59802
(406) 721-5700

ATTORNEYS FOR PETITIONER

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January *7th*, 1994.

/s/ *Fred Daniel Van Dyken*
Petitioner

INSTRUCTION G

You are instructed that the offenses of deliberate homicide and mitigated deliberate homicide relate to conduct which is done deliberately: that is "knowingly" or "purposely." On the whole, it is a person who means to do the thing that constitutes the crime, knowing he is doing it, and knowing that there is a substantial and unjustifiable risk in doing it, whose mental state falls within these definitions.

For deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the (result of) death, but that he did it with the knowledge that he was causing or with the purpose to cause the death.

More specifically, the mental state "purposely" is the more serious or wrongful mental state and implies an objective or design. It is where a person's conscious object is to cause a particular result.

"Knowingly" refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Where a person is aware that it is highly probable that a certain result will be caused by his conduct, he acts knowingly with respect to the result of that conduct.